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# Transportation Communications International Union

**Robert A. Scardelletti, *International President***

**LEGAL DEPARTMENT**

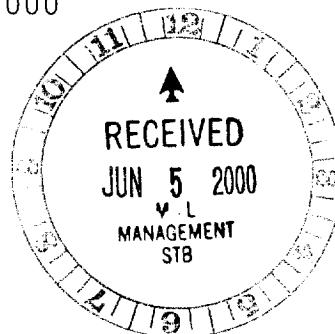
**Mitchell M. Kraus, *General Counsel***

**Christopher J. Tully, *Assistant General Counsel***

June 5, 2000

VIA MESSENGER

Mr. Vernon A. Williams, Secretary  
Surface Transportation Board  
1925 K Street, NW, Suite 700  
Washington, DC 20423-0001



Re: Major Rail Consolidation Procedures  
STB Ex Parte No. 582 (Sub-No. 1)

Dear Mr. Williams:

Enclosed please find an original and twenty-five copies of the Reply Comments of Transportation•Communications International Union, International Brotherhood of Electrical Workers, American Train Dispatchers Department-BLE, and International Association of Machinists and Aerospace Workers in the above-captioned matter. Copies have been mailed to all Parties of Record. I am also enclosing a diskette formatted in WordPerfect 9.0.

Thank you for your attention to this matter.

Very truly yours,

Mitchell M. Kraus  
General Counsel

MMK:fm  
Enclosures

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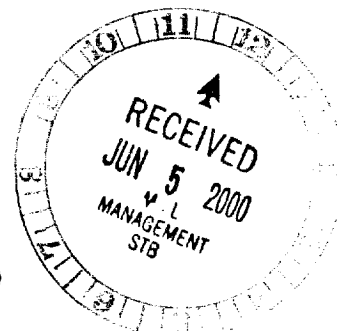
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BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, D.C.



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STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

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REPLY COMMENTS OF  
TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION (TCU),  
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (IBEW),  
AMERICAN TRAIN DISPATCHERS DEPARTMENT-BLE (ATDD),  
AND INTERNATIONAL ASSOCIATION OF MACHINISTS  
AND AEROSPACE WORKERS (IAM)  
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In our opening comments, we made clear that we were joining the Transportation Trades Department in urging a discontinuance of "cram down," but in the event that the Board rejected this position, we proposed that the Board adopt conditions regulating and limiting its use. Our proposal parallels terms on which the National Carriers Conference Committee recently reached an agreement with the United Transportation Union. Central to that agreement was the provision that where work was to be consolidated, the affected union(s), not the carrier, should select the applicable collective bargaining agreement. We urged that this result made practical sense, and was consistent with the Board's decision in Carmen III. Our proposal modifies the UTU agreement to make it more suitable to the needs of the non-operating crafts.

The National Railway Labor Conference (NRLC), in its comments, has urged that the recent UTU agreement offers the best prospect for a resolution of the cram-down issue (NRLC Comments at p. 4). The NRLC, however, argues that any modification of the existing cram-down rules can be accomplished only through an industry-wide agreement, not via this rulemaking. We disagree.

The standards for cram down were created by the ICC/STB. Therefore, it is appropriate for the Board to modify them. While an agreement between the carriers and all rail labor organizations is certainly an enviable goal, the absence of such an agreement should not cause the Board to refrain from addressing this issue.

As made clear by the U.S. Department of Transportation's (USDOT) Comments, the rationale for cram down in the face of two major eastern and two major western carriers is no longer applicable, assuming it ever was (USDOT Comments at pp. 24-25). The Board in Carmen III found that it need not wait for an agreement among all parties in order to articulate the standards for implementing cram down.

We have pointed out the difficulties in relying on arbitrators to implement the abstract standards of Carmen III,<sup>1</sup> and the need to

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<sup>1</sup>Compare the reasoning of Arbitrator Fredenberger in Norfolk Southern Railway Co., CSX Transportation and Consolidated Rail Corporation and Brotherhood of Maintenance of Way Employees, et al., STB Fin. Docket No. 33388 (Sub-No. 88), with that of Arbitrator O'Brien in Union Pacific Corporation-Southern Pacific Corporation Petition for Enforcement, STB Fin. Docket No. 32760 (Sub-No. 36) (Feb. 24, 2000).

clarify those principles. The USDOT has echoed these concerns, suggesting that the Board refine the concept of "necessity", the statutory limitation on the Board's override authority, 49 U.S.C. § 1321. (USDOT Comments, pp. 25-26). The question, according to the USDOT, is not whether the proposed change in a pre-merger collective bargaining agreement will result in an operating efficiency, but whether the absence of such change will effectively prevent the merged carriers from operating as merged entities.

These same concerns were voiced by the Fifth Circuit Court of Appeals in City of Palestine v. United States, 559 F.2d 408, 414-15 (5<sup>th</sup> Cir. 1977), in which the court reversed an ICC decision overriding a contract requiring the carrier to maintain facilities within the plaintiff municipality. The court distinguished between those contracts which might "burden" a transaction and those which were an "obstacle" to the merger. The latter "threaten[s]" the merger's success and was subject to the ICC's override authority, while the former did not pose such a threat and, therefore, was not subject to the override authority.

The court concluded that the override authority was not a "hunting license" to set aside contracts that might limit a railroad's efficiency. In interpreting Section 5(11) of the Interstate Commerce Act, the predecessor of current Section 11321, the court emphasized that the Act granted override authority of those contracts necessary to effectuate the merger, and that

necessity required more than a showing that a contract was a burden:

No doubt the merged MoPac system would operate more efficiently and free of "burdens on interstate commerce" without the strictures of the Palestine Agreement, just as it would operate more efficiently and free of "burdens on interstate commerce" if it were relieved of its contractual obligation to pay its debts or a bargained-for wage scale. Congress allowed the ICC significant power to effectuate approved transactions, but it did not authorize gratuitous destruction of contractual relations-even when it serves the general public interest-when the destruction is irrelevant to the success of approved transactions.

Ibid at 415.

While the Board has articulated a necessity standard in Carmen III, it has failed to make clear that necessity means more than achieving some vague operational efficiency. The USDOT Comments urge a return to the test for exercising the exemption authority enunciated by the Fifth Circuit in the City of Palestine case. We agree.

We, therefore, request that the Board adopt the rules we proposed in our initial Comments for exercising its exemption authority under 49 U.S.C. § 11321, and to make clear that such authority is to be used only as necessary to effectuate the merger, and not merely to secure operating efficiencies.

Respectfully submitted,



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Dated: June 5, 2000

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the Reply Comments of Transportation•Communications International Union, International Brotherhood of Electrical Workers, American Train Dispatchers Department-BLE, and International Association of Machinists and Aerospace Workers was mailed this 5<sup>th</sup> day of June, 2000, via U. S. Mail, postage prepaid, to all Parties of Record.



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Mitchell M. Kraus